BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BLISS A. MARTIN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,058,718
STAFFPOINT	)	
Respondent	)	
AND	)	
	)	
COMMERCE & INDUSTRY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the September 20, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven J. Howard. Steffanie L. Stracke of Kansas City, Missouri, appeared for claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 18, 2012, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

In her Application for Hearing, claimant asserted that on October 11, 2011, she sustained a back injury by repetitive lifting of boxes and filling orders in the course and scope of her employment. Claimant agreed to a drug screen and gave a urine sample on October 14, 2011, at OHS-Compcare (OHS). An initial drug test indicated claimant was positive for cocaine metabolite and amphetamine in her urine. A confirmatory test indicated claimant was over the confirmatory test cutoff levels for amphetamine and cocaine as contained in K.S.A. 2011 Supp. 44-501(b)(1)(C). Claimant contended at the preliminary hearing that the drug test was not conducted within a reasonable time as required by K.S.A. 2011 Supp. 44-501(b)(3)(A). She also contends that after receiving the drug test results from respondent, she requested another drug test, but respondent never agreed to claimant's request.

Respondent asserted in its brief that claimant failed to prove that she sustained a back injury by accident arising out of and in the course of her employment as she could not identify any particular trauma or anything that occurred out of the ordinary at work that caused her injury.

Although there was no specific finding in his Order, ALJ Howard cited the fact that claimant's drug test was performed three days after the accident, implying it was not performed in a reasonable manner. He indicated claimant is entitled to benefits and authorized Dr. Ciccarelli to treat claimant, which implies he found that claimant sustained a back injury by accident arising out of and in the course of her employment with respondent.

The issues before the Board are:

1. Did claimant sustain a back injury by accident arising out of and in the course of her employment with respondent?

2. Was claimant impaired by illegal drugs on the date of her alleged injury by accident? Was claimant's drug test, which was conducted three days after her injury by accident, within a reasonable time after her accident? Was the delay caused by claimant and, if so, what is the consequence?

3. Is respondent legally required to grant claimant's request to be retested for drugs? If so, did respondent deny claimant's request to be retested?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

In her Application for Hearing, claimant alleged the cause of her injury was repetitive lifting of boxes and filling orders. However, the only date of accident or injury specified was October 11, 2011. Claimant was employed by respondent as a temporary worker. Beginning June 2011, she had been assigned to work at Smart Warehouse as a picker, unloading boxes. During her shift, claimant would repetitively lift heavy boxes weighing up to 75 pounds. On October 11, 2011, claimant was lifting a box containing cases of butane, weighing at least 50 pounds, when she felt immediate pain. She took a break and told Mark, the manager at Smart Warehouse, of possibly suffering a back injury. She continued to work that day, but switched to a job counting items. On cross-examination, claimant testified she felt a pain while lifting boxes, but did not really pay attention to it and kept working. The next day, claimant woke up in pain and called Mark. During the call she reported that she injured her back lifting boxes the previous day at work. Mark directed claimant to go to OHS and to call respondent. Claimant called respondent and respondent made arrangements for claimant to be seen at OHS.

Claimant testified that because of transportation issues, she was unable get to the first scheduled appointment at OHS. Consequently, claimant first went to OHS on October 14, 2011. On that date, she was requested by respondent to undergo a drug screening. Claimant agreed and gave a urine sample. Claimant reported her back symptoms to OHS and was given medication and temporary restrictions. Respondent would not permit claimant to return to work with the restrictions given to her by OHS. Due to her severe pain, claimant returned to OHS on October 18, 2011, which was earlier than scheduled. At that time, she learned that she had tested positive for cocaine and amphetamines. Claimant testified that she takes the prescription medications Xanax and Adderall, which, she indicated, can cause a positive test for benzoylecgonine (a cocaine metabolite) and amphetamines. She was shocked when learning of the drug test results, as she has never used cocaine. Claimant had no explanation as to why her drug test was positive for cocaine.

Claimant testified that during the week following October 18, 2011, she requested respondent to be retested on at least four occasions. According to claimant, respondent kept putting off retesting her, so she hired an attorney. At the time of the preliminary hearing, claimant had never been retested. She testified she had never previously failed a drug test. After October 18, 2011, respondent refused to provide any further treatment for claimant's back. At the preliminary hearing, claimant still had pain on both sides of her buttocks and pain going into her back. She also testified of having numbness and pain in both legs. Claimant testified she now works for a title company, but was not asked when that job began. At the title company, she works within the temporary restrictions given to her by OHS.

The medical records of OHS indicate claimant saw Dr. William H. Tiemann on October 14 and 18, 2011. His notes indicated that claimant had been lifting boxes of various sizes and weights for the past seven weeks. Claimant reported straining her back on October 11, 2011. The October 14 notes indicate claimant attributed the strain to lifting. But in the October 18 notes, the doctor reported claimant was uncertain how the strain happened. A lumbar spine x-ray was taken, which was normal. Dr. Tiemann's assessment was lumbar strain and spasm. He recommended physical therapy, prescribed medications, and provided restrictions, including no lifting more than 10 pounds.

At the preliminary hearing, respondent introduced the drug test results as an exhibit. It appears that OHS took the urine sample and submitted it to Quest Diagnostics. The urine sample was tested twice. The initial test indicated claimant was positive for amphetamine and cocaine metabolites. The report indicates the "MS Confirm Test Level"[1] is 500 nanograms per milliliter for amphetamine and 150 nanograms per milliliter for cocaine metabolites. The report then listed quantitative results of: (1) amphetamine, 3437 ng/ml; (2) alprazolam metabolite, 950 ng/ml; and (3) cocaine metabolite, 9199 ng/ml.

[1] P.H. Trans., Resp. Ex. A.

Claimant did not object to the report. In its brief, respondent asserted the confirmatory test was done using a mass spectroscopy.

At the request of her attorney, claimant was evaluated on February 13, 2012, by Dr. Michael J. Poppa, board certified in occupational and preventive medicine. His report indicated claimant was required to engage in repetitive lifting of boxes and filling orders when she experienced pain and spasm involving her lower back with left lower extremity radicular symptoms. She denied having any previous injuries or medical treatment involving her back. He diagnosed claimant with thoracic spine chronic musculoligamentous sprain-strain/thoracic pain and lumbar spine chronic musculoligamentous sprain-strain/probable lumbar annular disc tear/lower extremity radiculitis/lumbar pain. Dr. Poppa opined that claimant's employment at respondent was the prevailing factor causing her injury, medical treatment and disability.

The ALJ did not specifically find that claimant sustained a personal injury by accident arising out of her employment with respondent. Nor did he specifically find that the drug test was excluded. Instead, he stated in the September 20, 2012, Order,

> Claimant denies any un-prescribed drug use. Further, the drug screen performed was three days following claimant's alleged accident. Accordingly, claimant is entitled to benefits and Dr. Ciccarelli is authorized to treat. The costs of said treatment to be paid by Respondent/Insurance Carrier[.]

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[2] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[3]

There is sufficient evidence in the record to prove that claimant sustained a back injury by accident arising out of and in the course of her employment with respondent. Claimant's testimony as to how she injured her back is uncontroverted. She felt immediate pain after lifting a 50-pound box, which indicates she sustained a single traumatic accident. Claimant reported the same mechanism of injury to OHS and Dr. Poppa. She also testified that she had never suffered a back injury prior to October 11, 2011. Dr. Poppa's opinion that claimant's employment was the prevailing factor causing her injury, medical treatment and disability is also uncontroverted.

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[2] K.S.A. 2011 Supp. 44-501b(c).

[3] K.S.A. 2011 Supp. 44-508(h).

K.S.A. 2011 Supp. 44-501(b) states in pertinent part:

(1) (A) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including, but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens.

(B) In the case of drugs or medications which are available to the public without a prescription from a health care provider and prescription drugs or medications, compensation shall not be denied if the employee can show that such drugs or medications were being taken or used in therapeutic doses and there have been no prior incidences of the employee's impairment on the job as the result of the use of such drugs or medications within the previous 24 months.

(C) It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that, at the time of the injury, the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:

	Confirmatory test cutoff levels (ng/ml)
Marijuana metabolite[1]	15
Cocaine metabolite[2]	150
Opiates:	
Morphine	2000
Codeine	2000
6-Acetylmorphine[4]	10 ng/ml
Phencyclidine	25
Amphetamines:	
Amphetamine	500
Methamphetamine[3]	500

[1] Delta-9-tetrahydrocannabinol-9-carboxylic acid.
[2] Benzoylecgonine.
[3] Specimen must also contain amphetamine at a concentration greater than or equal to 200 ng/ml.
[4] Test for 6-AM when morphine concentration exceeds 2,000 ng/ml.

(D) If it is shown that the employee was impaired pursuant to subsection (b)(1)(C) at the time of the injury, there shall be a rebuttable presumption that the accident, injury, disability or death was contributed to by such impairment. The employee may overcome the presumption of contribution by clear and convincing evidence.

(E) An employee's refusal to submit to a chemical test at the request of the employer shall result in the forfeiture of benefits under the workers compensation

> act if the employer had sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes post-injury testing.
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> (2) The results of a chemical test shall be admissible evidence to prove impairment if the employer establishes that the testing was done under any of the following circumstances:
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> . . . .
>
> (D) the worker voluntarily agrees to submit to a chemical test for drugs or alcohol following any accident or injury; or
>
> . . . .
>
> (3) Notwithstanding subsection (b)(2), the results of a chemical test performed on a sample collected by an employer shall not be admissible evidence to prove impairment unless the following conditions are met:
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> (A) The test sample was collected within a reasonable time following the accident or injury;
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> (B) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;
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> (C) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;
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> (D) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample;
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> (E) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee; and
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> (F) a split sample sufficient for testing shall be retained and made available to the employee within 48 hours of a positive test.

Here, claimant underwent a drug test three days after her accident and back injury. The ALJ's Order implies that this was not within a reasonable time after the injury as required by K.S.A. 2011 Supp. 44-501(b)(3)(A). Respondent argues that the time period was reasonable, and if it was not reasonable, the delay was the fault of the claimant. This Board Member affirms the implied finding of ALJ Howard on this issue.

The purpose of drug testing as prescribed by K.S.A. 2011 Supp. 44-501(b) is to determine whether at the time of an accident or injury, the injured worker was impaired by

illegal drugs. Therefore, it is imperative that the sample used for drug testing be obtained from the injured worker within a reasonable time after the date of the accident or injury. A urine sample collected three days after an employee's injury is not collected within a reasonable time after the accident or injury as required by K.S.A. 2011 Supp. 44-501(b)(3)(A). Quite simply, the issue is whether claimant was impaired by cocaine on the date of her injury, not three days later.

There is no dispute claimant delayed three days in going to OHS. She testified this was due to transportation problems. Insufficient evidence was presented to show that claimant purposefully delayed going to OHS. In fact, there is nothing in the record to indicate claimant knew or was advised prior to going to OHS that she was going to be required to take a drug test once she arrived there.

Claimant raised the issue that respondent refused to allow her to be retested for illegal drugs. K.S.A. 2011 Supp. 44-501(b) does not require respondent to retest claimant, if claimant so demands. However, K.S.A. 2011 Supp. 44-501(b)(3)(F) does require respondent to retain a sample sufficient for testing and make it available to the employee within 48 hours of a positive test. No evidence was presented that this was done. Nor was there any evidence presented to show, as required by K.S.A. 2011 Supp. 44-501(b)(3)(C), that the test was performed by a laboratory approved by the United States Department of Health and Human Services or licensed by the Department of Health and Environment. This Board Member finds that even if the drug test was conducted within a reasonable time after claimant's accident, respondent failed to comply with the provisions of K.S.A. 2011 Supp. 44-501(b)(3)(C) and (F).

Without the drug test results, there was little evidence to show claimant was impaired on the date of accident. No coworkers or supervisors testified that claimant appeared to be impaired on the date of accident.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[5]

CONCLUSION

1. Claimant sustained a back injury by accident arising out of and in the course of her employment with respondent.

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[4] K.S.A. 2011 Supp. 44-534a.

[5] K.S.A. 2011 Supp. 44-555c(k).

2. There is insufficient evidence in the record to show claimant was impaired by illegal drugs on the date of her accident.

WHEREFORE, it is the finding of this Board Member that the September 20, 2012, Order entered by ALJ Howard impliedly finding that claimant met with personal injury by accident arising out of and in the course of her employment with respondent and that claimant was not impaired by illegal drugs on the date of accident is affirmed.

IT IS SO ORDERED.

Dated this ____ day of December, 2012.

THOMAS D. ARNHOLD
BOARD MEMBER

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Steven J. Howard, Administrative Law Judge